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LAW OF EVIDENCE.

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THE following articles on the Law of Evidence appeared as editorials in the Press, and discuss in a plain way the necessity of admitting as witnesses, parties and persons interested in conformity to the law of England, of the courts of the United States, and of nearly every civilized state where the common law prevails.

The decisions in Pennsylvania on this subject, are a disgrace to her reports, which should be removed at once by legislative action.

LAW OF EVIDENCE.

No. 1.

The state of the law of evidence in Pennsylvania in relation to the admission of a large class of persons as witnesses in civil actions has long been the subject of complaint, and occasional partial attempts at legislation have been made to put us on a footing with England and with many of our most enlightened sister States. Our law excludes, as a general rule, all parties to the record, and also all persons who have any interest in the issue, no matter how small, even to the value of a single cent. This rule has been defended upon the ground of public policy, which is shivered to atoms by the practice of twenty millions of people in England and upwards of eight millions in nearly adjoining States, compris-

ing a large part of the commerce, agriculture, manufactures, wealth and industry of the Union. The other argument, the temptation to perjury, which presupposes every man to be a rogue in his own case, has been practically proved to be equally futile and groundless. We admit, as a competent witness, a father, mother, brother, sister, daughter, and son; we allow affidavits to be made by parties and persons interested, and often decide applications for injunctions upon such testimony. By bills of discovery we practically put the defendant on the stand, and in proceedings in equity the answer of the defendant is on oath, and on hearing on bill and answer it often becomes conclusive. On motions to open judgment issues are often granted upon express stipulation that the parties and all interested persons shall be competent witnesses for or against themselves. These examples in the law prove clearly that the general rule has been found unwise and impolitic.

In Pennsylvania we have had a mixed system of law and equity, which has made a distinct court of equity useless. Chief Justice TILGHMAN had much to do in laying its foundations upon a sure and stable basis, and disregarding the technical rule that a chose in action cannot be legally assigned so as to permit the action to be brought in the name of the assignee, he allowed the assignor in Steele v. The Phœnix Insurance Company to be a competent witness for his assignee, but like Lord MANSFIELD, who was succeeded by Lord KENYON, he was succeeded by judges who did not emulate his courageous wisdom. Under their ruling, this subject of parties and persons interested being considered as entirely incompetent, has produced a series of decisions which are an indelible disgrace to the judicial records of a civilized community. No man can read the liberal and advanced language of the Chief Justice in Steele v. The Phœnix without feeling its justice and sound philosophy; and yet we find the same court, with different judges, thirty-five years afterwards, using the following absurd language in Wolf v. Fink: "It must be admitted that the witness had not a particle of interest in

the event of the suit. But he may probably have had; but the exclusion of a witness cannot be rested on that ground. The only tenable objection is, that at the time of the impetration of the writ, and the award, he was a party to the suit. *Is this a valid objection to his competency? We are of opinion it is.*" "It arises from considerations of policy." They had excluded plaintiffs, and therefore they excluded defendants. It is a somewhat singular fact that all the cases cited as supporting this decision, from New York, the Supreme Court of the United States, and England, would now be decided in those tribunals differently, and both plaintiffs and defendants would be admitted as witnesses, leaving their credibility to the jury. That Wolf v. Fink is still the law of Pennsylvania is evidenced by an opinion of the Supreme Court, delivered a few days ago, where a decision of the court below was obliged to be reversed for such an error, which, if tried before Judge GRIER or Judge CADWALADER, would have been no error at all.

There was a strong tendency in England to extend the practice of special pleading by additional rules of court, which were adopted by the District Court here, but soon abandoned in disgust, and which in England were swept away with the objections to witnesses by the Common-Law-Procedure Acts, and by the Evidence-Amendment Acts.

The first act in 1833 rendered witnesses competent, for or against whom the verdict or judgment would be admissible in evidence, but it was provided that such verdict or judgment should not be admitted in evidence for or against them. By Lord DENMAN'S Act, in 1843, no person offered as a witness shall be thereafter excluded by reason of incapacity from crime or interest, and by the County Court Act of 1846 the Parliament had the courage to enact that, "on the hearing or trial of any action, or on any other proceeding under this act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath or solemn affirmation." By the acts of 1851 and 1853 this rule, with a few immaterial exceptions, has

been extended to all the courts in England. "It is believed," says Mr. TAYLOR, "that at present every eminent lawyer in Westminster Hall will most readily admit that this change in the law has been productive of highly beneficial results." The common-law commissioners have expressed an opinion most favorable to the measure, and in their second report have observed that, "according to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably, and to contribute, in an eminent degree, to the administration of justice."

The county courts have a jurisdiction up to 50*l.* or $250, and are presided over by sixty judges, sitting singly, each of whom receives a salary of 1200*l.* or $6000, equal to a judge of the Supreme Court of the United States. In 1863 there were 800,000 plaints in these courts, and 100,000 suits in the three superior courts of law, presided over by fifteen judges, each of whom (the puisne judges) receives a salary of 5000*l.* or $25,000, equal to that of the President of the United States, whilst the Lord Chief Justice receives 8000*l.* or $40,000, and yet, in all this extended litigation, continuing, year after year, not a voice is raised against this enlightened and liberal policy which allows the truth to be gathered from all sources of testimony.

We are aware that old practitioners who have gained causes by the exclusion of the truth, and judges who are wedded to old notions of exploded policy, are opposed to these terrible innovations upon the common law rules of evidence, and cling to the ancient prejudices of the profession; but when they look around and see this new policy of not excluding the truth prevailing to a great extent in our sister and adjoining States, it is certainly time to rise up from their slumbers and awaken to the necessities of the present generation. Maine, New Hampshire, Massachusetts, Connecticut, New York, and Ohio have followed in the wake of England, and the statute of Connecticut, passed in 1848, is probably the simplest and most comprehensive.

On the 2d of July the Congress of the United States made

this the governing principle of the District of Columbia, and on the same day, by the proviso to the third section of another act, enacted "That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to or interested in the issue tried." So that in those courts held in this State by Judges GRIER, CADWALADER, and MCCANDLESS the rule of exclusion from interest or being a party to the record is abolished, and no longer exists. Is it possible, then, that the rule of exclusion can be longer permitted to exist in the courts of the State of Pennsylvania?

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On all convictions for robbery, burglary, larceny, forgery, and certain other crimes, the defendant, in addition to the punishment prescribed, is adjudged to make restitution or compensation to the owner, who is, however, rendered a competent witness on the trial of the offender. The revisers of our Penal Code, Judges KING and KNOX, and Mr. WEBSTER, reported a section which is now law, rendering convicts who had served out their time competent witnesses. In their Report on the Penal Code, they say: "This section is new; it is founded on the principle that if the offender has fully suffered the punishment inflicted by law upon his crimes, he should be restored to society without any further legal taint. This follows as a logical consequence, from the principle of our penal system, that the great object of punishment is the reformation of the offender. In effect the object of this statute is at present attained through the pardon of the Governor, which is continually invoked to restore such persons to their competency as witnesses, after they have fulfilled the sentence of the law; a large portion of the pardons actually granted by our Governors are given to persons so circum-

stanced. In England this principle has been introduced into their recent legislation; Pennsylvania, that may justly boast of being the pioneer in the amelioration of the penal laws, will hardly be disposed to be less liberal."

At present, therefore, all criminals are either competent by law, or may be rendered so by the Governor, and we therefore have but to take one step further, and remove the incapacity entirely by act of Assembly. So persons in interest in many criminal proceedings, as we have seen above, are rendered competent, although the recovery of their property may depend entirely upon their own testimony.

Inhabitants in settlement cases, in cases where the overseers of the poor are parties, in suits for breaches of ordinances, borough officers, inhabitants of cities, and school districts, are rendered competent by acts of Assembly where they would be held incompetent, by reason of some supposed interest, in taxes, fines, penalties, or forfeitures.

Still further, by express enactment, "The Orphans' Court, or any auditors appointed by them, shall have power to examine, on oath or affirmation, any of the parties to any proceedings instituted in such court respecting any matter in dispute in such proceedings; and the said court shall have power to compel the production of any books, papers, or other documents necessary to a just decision of the question before them or before auditors."

Now, the parties to the accounts of executors and administrators are the accountants, creditors, legatees, distributees, and sometimes devisees and heirs, and by this broad and comprehensive language the courts are clearly vested with the power to examine any or all of them, whether for or against themselves. But No, said the old Supreme Court, in the same spirit, which produced Wolf v. Fink, this is not the meaning. "The language of the act is very comprehensive," said the learned judge, "and well adapted to the purpose for which it was intended, viz., *To enable the court to do justice by an examination, at the instance of the opposite party, of the accountant*, as to the disposition of the assets

and the management of the estate, and to compel the production of such books and papers in the possession of *either party* as may conduce to an elucidation of the matters in controversy. The Legislature has conferred upon the Orphans' Court a power undeniably exercised by a court of chancery; but they certainly did not intend to alter all the rules of evidence heretofore considered sacred in courts of law and equity *by the introduction of the mischievous and pernicious principle of enabling a party in interest to give evidence in his own cause" ! ! !*

Upon a theory therefore of his own, the learned judge puts words into the section that cannot be found in it, and substitutes particulars for generals, so as to enable him to read it, not as the Legislature passed it, but as he thinks it ought to be. The examination is not to be in the power of the court, but of the opposite party, and the accountant is the only one to be questioned against himself, and not to be permitted to testify one word in his own favor, however necessary it may be to lay bare the whole truth; and yet with singular inconsistency any party may be obliged to produce books. But when it is positively declared that the court shall have the power and may examine any of the parties to the proceedings, how can it be said that they shall not be examined because an old common law rule of evidence says they are not competent, whether from interest or as parties to the record? Why, the very object of the act is to make them competent, and have not the Legislature the power to alter an absurd rule, the relic of a bygone age?

There can therefore be no doubt that the Orphans' Court, by express legislative enactment, possesses the power to examine all parties to any proceeding, respecting any matter in dispute in such proceeding, either for or against themselves, as the court may deem just and proper. Such ought to be the decision of the present day, and no Orphans' Court exercising the power thus given them by express legislative grant need fear the ghost of a decision a quarter of a century old.

The philosophy of the present age is founded on a more charitable view of human nature than was indulged in by the prejudices of our ancestors, whose rules of action were often framed in the darker ages of the human race, and by narrow-minded and bigoted persons. "If," says Mr. TAYLOR, "the rules of exclusion, recognized till lately by the English law, had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature. In rejecting the evidence of parties to the record, and other interested witnesses, the law acted on the presumption, not only that such persons, sooner than make a statement which might prejudice themselves, would commit deliberate perjury, but that, if they did so, juries would be incapable of detecting the falsehood. A more unfounded calumny upon the veracity of witnesses and the intelligence of juries cannot well be imagined."

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An applicant for the benefit of the Insolvent Laws makes himself a witness, and upon his examination must produce all books and papers, and must answer all questions put to him by the court or his creditors, and if by his examination or other evidence the court should believe his insolvency arose from gambling, or the purchase of lottery tickets, or that he has embezzled any money, either as bailee, agent, or depositary, or that he has concealed or conveyed his estate with intent to defraud his creditors, it is made their duty to commit him for trial; and if upon such trial he is convicted, he may be sentenced for embezzlement or concealment of property, to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years, and for insolvency

produced by gambling or purchase of lottery tickets to an imprisonment not exceeding three years. Trustees, bankers, merchants, brokers, attorneys, agents, directors, officers, and members, for certain breaches of trust, are punishable by fine or imprisonment, or both, but they cannot refuse to make a full and complete discovery, by answer to any bill in equity, or to answer any question or interrogatory, in any civil proceeding in any court of law or equity, but no such answer shall be admissible in evidence against such persons charged with said misdemeanors.

These persons are, therefore, witnesses, although in the first instance their testimony may convict them of a crime, and in the second instance they are forced to testify as to transactions for which they are liable to criminal punishment. But a party or person in interest may make affidavits to hold to bail and of defence, and in Allegheny County he is forced, in certain cases, to swear, to his cause of action. In all these cases he is a witness for himself, and if subjected to cross-examination he would be a witness for his opponent. In equity, on motions for injunctions, both parties testify as witnesses now, on affidavits, and if cross-examined, as we believe is now done in England, they would be, to the fullest extent, witnesses in such cases. An affidavit presents one side of a case, or, with cross-examination, presents both sides, and in England, in equity, a very large number of cases are decided upon affidavit. A motion for a preliminary injunction, involving thousands of dollars, may be granted on the affidavit of the plaintiff, and refused on that of the defendant; if both were cross-examined the court would have the whole truth, so far as the parties could tell it.

These are some of the instances in which interested parties really testify, and we refer to our former articles for others.

Now, what is the objection to parties and interested persons being competent witnesses in civil actions? A disbelief in their veracity; a total exclusion, because we believe they cannot and will not tell the truth,—this is the only ground; if so, no party or person interested ever should be allowed to

testify by affidavit or otherwise. But the law says no; in a great number of instances from necessity, or some other reason, we do consider them competent, and we will judge of their credibility; if so, why not make them competent and subject to the same rule as to their credit? Because a witness is competent we are not bound to believe him, and his credibility is always for the jury. How often do we hear a judge say, "This witness has sworn positively, if you believe him;" or where two witnesses have sworn directly contrary to each other, how common is it to say, "If you can reconcile the testimony of these witnesses, do so; if you cannot, you will take that one whose evidence you believe is most consistent with the truth and your view of the facts?" Why not hear every one, who knows anything, and let the credibility of each witness be judged separately of by the jury?

Do you not in the ordinary intercourse of life trust what your neighbor says of a matter in which he is interested? Do you say to him, "You are not competent to narrate what concerns yourself; you will tell me an untruth, and, therefore, I will not hear you?" If such were the true doctrine the business of life would stop, because before you will hear anything you must investigate whether the narrator has not six cents interest, which he has not and perhaps cannot get rid of.

But what is the evil if you hear both parties for and against themselves, subject to an oral cross-examination before a court and jury? Do you distrust the capacity of thirteen men, one of them a lawyer of eminence, to find out the truth? If both tell the same story, or if it is told with immaterial alterations, then there is no difficulty; if each tells a different story, in what does it differ from any two ordinary witnesses doing the same thing; or suppose one is a rogue and the other an honest man, you treat them as any other two ordinary witnesses of similar character; you believe one and not the other, where the variance is material. But it is objected, if one party is dead should you examine the living party? Certainly you should; always get as much truth as you can.

The deceased man may be able really to tell nothing, for he may have acted by an agent; but whether or not, why exclude the living witness? It could only be on one hypothesis,—that he cannot tell the truth.

Suppose each party has five witnesses; the five witnesses of the defendant die; for a similar reason the five living witnesses of the plaintiff should be excluded. Why are friendly references made of important cases? Because each party tells his own story, and witnesses, competent or not, are heard, and often without the sanction of an oath. Is it not wiser and more consistent, with our knowledge of human nature, to hold all these persons competent, and let the proper tribunal judge of their credit? The present rule of exclusion has many broad and striking exceptions, which demonstrate that it is erroneous and founded on the narrowest and most technical views, and that the exceptions should really form the general rule.

Gentlemen who have practiced in the criminal courts often believe witnesses are rogues, particularly those who are called to prove *alibis;* but they must recollect that they are generally dealing with a depraved class of the community; but still, they must concede that this objection does not apply to parties; for the defendant cannot be a witness, and the prosecutor is always competent. The objection, therefore, is to all witnesses, and, if true, then no witnesses should be permitted to testify.

But there are signal instances of rogues defeating themselves. A person named Smyth claimed to be heir to an estate of £30,000 per annum and to a baronetcy, and was the plaintiff in an ejectment tried at the Assizes, at Gloucester, before Justice Coleridge, and was put upon the stand to prove his own case. His counsel, Mr. Bovill, Mr. Phipson, and Mr. Dowdeswell, were men of high character. Sir Frederick Thesiger, afterwards Lord Chelmsford, was counsel for the defendant. The plaintiff told an apparently plausible story, and pretended he was a man of education. Upon cross-examination it appeared that he did not spell cor-

rectly, and was evidently a mere charlatan. He contradicted himself; but what finally put an end to him was the production of a family brooch and rings, which he made a conspicuous piece of evidence. The evidence was regularly telegraphed and published in the *Times*, when Sir FREDERICK received a telegram from a jeweller in London, who had read the testimony, stating that he had cut it for this man a short time before. The perjury became so clear that the counsel of the plaintiff threw up their briefs, stating that they had been completely deceived, and this ended the case.

This policy is so firmly settled by experience in England, that neither the Legislature, the Bench, the Bar, nor the people could be induced to return to the old antiquated and absurd rule of exclusion.

The reader will find the case of SMYTH v. SMYTH, in the *Law Magazine and Quarterly Review of Jurisprudence*, for November, 1853, vol. 19, New Series, p. 294. The editor says: "Among the *causes celebres,* which at intervals appear in our courts of justice, the case of SMYTH v. SMYTH, tried at the late assizes for Gloucester, deserves to be recorded. We have here an instance of a gigantic fraud being perpetrated upon attorneys, counsel, and all who listened *to the plaintiff's story, until he appeared in the witness-box*, when, by the combined efforts of cross-examination and electricity, the claimant of family name, honors, and estate, was made to appear but a clumsy forger and perjurer of the fifth or sixth magnitude. It is interesting to the philosopher and the lawyer to trace schemes of cunning through their dark and winding mazes, as it is gratifying to the moralist to behold the retribution which follows their exposure." "When the counsel withdrew from the case there remained upwards of fifty witnesses to be examined for the plaintiff, and eighty for the defendants."

The judge committed the plaintiff for perjury, and said they could go before a magistrate and prefer the charge of forgery.